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No. 90-1895

In The

Supreme Court of the United States

October Term, 1990

LOUIS P. BERGNA,

Petitioner,

v.

JULIUS L. FINKELSTEIN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In an action for damages by a public employee against his employer, a public official, for deprivation of property and liberty without due process of law, based on the public official's suspension of the employee without notice or prior hearing and on the public disclosure of the suspension and accusations of wrongful conduct, was the Ninth Circuit correct in determining that the public official was not entitled to qualified immunity in that his conduct violated clearly established law?

PARTIES TO THE PROCEEDINGS BELOW

Respondent concurs with Petitioner's statement identifying the parties to the proceedings below.

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JULIUS L. FINKELSTEIN, *Respondent*.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Julius L. Finkelstein respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That opinion is reported at 924 F.2d 1449 and is set forth in the Appendix at 1a to 22a.

JURISDICTIONAL GROUNDS

Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). Respondent does not dispute that the Petition is timely.

OPINIONS BELOW

Respondent concurs with Petitioner's statement regarding the opinions below, and incorporates by reference Petitioner's Appendix, which includes such opinions. The Ninth Circuit's final decision below (following withdrawal and modification of its initial decision) is reported at 924 F.2d 1449.

RELEVANT STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of relevant statutory provisions.

STATEMENT OF THE CASE

Relevant Factual Background

In 1982 Respondent Julius L. Finkelstein was a Deputy District Attorney for Santa Clara County, California. He worked for Petitioner Louis P. Bergna, then the elected District Attorney for Santa Clara County. Petitioner did not seek reelection in 1982. Respondent and Leo Himmelsbach ("Himmelsbach"), an Assistant District Attorney who also worked for Petitioner, ran against each other for Petitioner's position. Petitioner supported Himmelsbach and was honorary chairman of his campaign committee.

Shortly before the election, the press received information implicating Himmelsbach in improper conduct while an Assistant District Attorney. On October 25, 1982, eight days before the election, without prior notice or hearing, Petitioner suspended Respondent without pay, issued a press release and held a press

conference to announce the suspension. Respondent was suspended pending investigation for allegedly improperly "leaking" derogatory information regarding Himmelsbach. Respondent was suspended for 69 days, 30 of which were without pay. He lost the election. Although the state Attorney General's office eventually concluded that there was no evidence to support any allegation that Respondent had leaked the information, stories accusing Respondent of criminal wrongdoing and other unlawful and unethical conduct as a prosecutor and a lawyer appeared on television and in the press after the suspension.

Procedural History

Respondent initiated suit in October 1983, alleging, *inter alia*, under 42 U.S.C. § 1983, that by suspending him without prior notice or hearing, and announcing his suspension to the press, Petitioner deprived him of property and liberty interests associated

with his public employment, in violation of his federal constitutional right to due process. Petitioner asserted a defense of qualified immunity and moved for summary judgment on that basis. The District Court denied his motion.

Petitioner then appealed the denial of summary judgment to the Ninth Circuit, invoking that court's jurisdiction under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 524-530, 86 L.Ed.2d 411 (1985). In its final opinion and order the Ninth Circuit affirmed the denial of Petitioner's motion for summary Judgment on qualified immunity grounds as to Respondent's property and liberty interest claims. Applying *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982), *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523 (1987), and *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976), the Ninth Circuit upheld the District Court's determination that Petitioner had violated "clearly established law"

with respect to the deprivations of Respondent's property and liberty interests, rejecting Petitioner's claim that the distinction between suspension and termination was dispositive and that post-deprivation process afforded Petitioner was sufficient. 924 F.2d at 1451-1452, Appendix at 7a-8a.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner devotes fully three-fourths of his argument why the petition should be granted to a lament that the Ninth Circuit adopted an "erroneous approach" and failed to engage in the "particularized" immunity analysis adopted by this Court in *Anderson v. Creighton*, 483 U.S. 635 (1987). Petitioner thus attempts to elevate a claimed lack of analytic rigor into a "conflict" with this Court's authority. Petitioner then cites what he deems more "particularized" "detailed" and "careful" decisions of

other Circuits as establishing a "conflict" between the Ninth Circuit and those other Circuits. Having focused, throughout, on the highly "particularized" circumstances of his own immunity claim, Petitioner is then at a loss, not surprisingly, to argue that an important and recurring legal question is presented for this Court's review.

As demonstrated below, Petitioner has met none of the settled criteria for granting a petition for writ of certiorari. The Ninth Circuit's holding and analysis in fact are sound and correct and fully consistent with the applicable authority of this Court. Nothing in the Ninth's Circuit's analysis or holding conflicts with the law of other Circuits. Finally, because the Ninth Circuit's decision arises in the context of the narrow facts before it, which are unlikely to recur, the Petition fails to raise an important federal question meriting this Court's review.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT HAS NOT RENDERED A DECISION THAT IS IN CONFLICT OR INCONSISTENT WITH THE CONTROLLING AUTHORITY OF THIS COURT

Under Rule 17.1(c) one consideration governing review on certiorari is whether the federal court of appeals decision conflicts with applicable decisions of this Court on a federal question. However, because "[l]awyers . . . are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine[,] . . . the conflict must be direct and must be readily apparent from the lower court's rationale or result." R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, § 4.5 at 203 (6th Edition, 1986). *No* conflict, much less a direct or apparent conflict, exists in this case.

Petitioner argues that the Ninth Circuit decision below conflicts with *Anderson v. Creighton*, 483 U.S. 635,

because it "fails to follow the teaching" of that case "with respect to the method for determining whether official conduct was in violation of 'clearly established law' and therefore outside the protection of qualified immunity." Petition at 17. Petitioner complains, in essence, that the Ninth Circuit applied the "clearly established law" test for granting qualified immunity without the requisite degree of "particularity" called for by this Court in *Anderson*, and that a conflict thereby is established. Petition at 17-18. He thus contends that the Court below adopted an "erroneous approach" (Petition at 17), "framed its inquiry too broadly" (Petition at 29) and defined Respondent's due process claims "abstractly and only in general terms" (Petition at 22).

In reality, Petitioner's purported "conflict" claim is nothing more than a fact-bound attack on the merits of the decision below and is not worthy of this Court's consideration. It is well established that "the correctness

or erroneousness of the decision below is not meant to be the central focus of the Court's certiorari jurisdiction." Stern, *et al., Supreme Court Practice,* § 4.17 at 222. Nor would a mere deviation in the degree of particularity of a *Harlow/Anderson* immunity determination, absent a clear misapplication or defiance of this Court's authority, present this Court with the sort of true and direct conflict warranting certiorari review.

In fact, there is no conflict between the Ninth Circuit's decision below and this Court's decision in *Anderson*. The Ninth Circuit correctly analyzed the due process and qualified immunity issues before it under the applicable authority of this Court, including *Anderson v. Creighton*, and reached a correct result.

At the outset of its decision the Ninth Circuit quoted this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. at 818, for the proposition that "[a]n official is entitled to qualified immunity when the official's conduct

'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 924 F.2d at 1451, Appendix at 6a. The Ninth Circuit also invoked *Anderson v. Creighton* for the requirement that "the unlawfulness of the challenged conduct . . . be apparent in light of preexisting law." *Ibid.* The Ninth Circuit also cites its own earlier decision in *Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988), which clearly reflects its correct understanding and application of the *Anderson* standard:

> The "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039.

846 F.2d 1209, 1211; *see also DiMartini v. Ferrin*, 889 F.2d 922, 927 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 59 U.S.L.W. 3823 (1991).

There can thus be no doubt that the Ninth Circuit understood its task under *Harlow* and *Anderson*: to determine whether the law governing the particular circumstances and issues confronting Petitioner was "clearly established." The Ninth Circuit then proceeded to do precisely that.

With respect, first, to Respondent's claim that Petitioner deprived him of a property interest without due process of law, the Ninth Circuit began by noting that the inquiry turned solely on "what process is due[,]" as Petitioner had conceded that Respondent had a protected property interest in his employment. 924 F.2d at 1451, Appendix at 7a. Relying on *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975), and *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980), the Ninth Circuit then rejected Petitioner's distinction between a temporary suspension and a discharge. 924 F.2d at 1451, Appendix 7a. Invoking the three-part balancing test established by

this Court in *Mathews v. Eldridge*, 424 U.S. 319,[1/] and citing, *inter alia*, its own decision in *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982),[2/] the Ninth Circuit then concluded that it was clearly established that post-deprivation process was not sufficient in this case. *Ibid.*

Next addressing Respondent's liberty interest claim, the Ninth Circuit relied principally on *Vanelli*, in which it had reiterated the "strong presumption" that "a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest." *Vanelli*, 667 F.2d at 778;

[1/] The three *Mathews* factors to be balanced are: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of that interest through the procedures used and (3) the fiscal and administrative burdens that any additional procedural requirements would entail. 424 U.S. at 335.

[2/] *Vanelli v. Reynolds School District No. 7* was decided January 21, 1982, well before Respondent's October 1982 suspension.

citations omitted. The Court in *Vanelli* had also stated that "a liberty interest is 'implicated if a charge impairs [one's] reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment *or the alteration of some right or status recognized by state law.*'" 924 F.2d at 1452, Appendix at 8a, quoting *Vanelli*, 667 F.2d at 777-778; emphasis in original. Thus, contrary to Petitioner's repeated contention that the law was "clearly established" *only* as to termination, the Ninth Circuit had established that other alterations in a person's employment status, such as a suspension, implicated a liberty interest protected under the Due Process clause and could require pre-deprivation due process.

The Ninth Circuit's disposition of Petitioner's immunity claims is fully consistent with this Court's

decisions in *Harlow* and *Anderson*. Contrary to Petitioner's argument, the Ninth Circuit's failure expressly to characterize Respondent's rights or its own analysis as "particularized" does not signal a departure from the law set down in *Anderson*. If not as "particularized" as Petitioner would like, the Court's inquiry properly focused on "whether the unlawfulness of the conduct challenged . . . [was] apparent in light of preexisting law." 924 F.2d at 1451, Appendix at 6a, quoting *Anderson*, 483 U.S. at 639. "The conduct challenged" is that alleged by Respondent and described by the Court in its detailed recitation of the facts. 924 F.2d at 1451, Appendix at 5a-6a.

That the Ninth Circuit correctly understood its task under *Anderson* is further established by its treatment of Petitioner's First Amendment claim. On this issue the Ninth Circuit specifically found that while it was clearly established in 1982 that public employees

could not be disciplined for exercising their First Amendment rights and that suspensions could implicate First Amendment rights, it was *not* clearly established that "*prosecutors* were protected by the first amendment from such disciplinary actions." 924 F.2d at 1453, Appendix at 9a-10a; emphasis in original. There can thus be no doubt that the Ninth Circuit fully understands the meaning of the "particularized" analysis contemplated in *Anderson*.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT ON ANY IMPORTANT QUESTION OF FEDERAL LAW.

Because one of the fundamental purposes of certiorari jurisdiction is to ensure uniformity of decisions among the Circuits on important questions of federal law, this Court has granted certiorari review where a

conflict has arisen between or among federal courts of appeal. However, such conflict must be "direct[,] . . . square and irreconcilable" and must arise on an important question of federal law. Stern, et al., *Supreme Court Practice*, § 4.4. The Ninth Circuit's decision in this case creates no such conflict.

Petitioner devotes some five pages of his 27-page argument to the claim that the Ninth Circuit's "casual regard" for this Court's decision in *Anderson* "is at odds with the more careful application of the policies underlying *Anderson*'s particularity requirement by other Courts of Appeals." Petition at 36. However, Petitioner has not, and cannot, establish that any conflict -- much less a direct, square or irreconcilable conflict -- has arisen among the Circuits on the application of the immunity standards established by this Court in *Anderson*, nor that any other conflict has arisen on the law of qualified

immunity or on any other important question of federal law.

Petitioner's reliance on *Colaizzi v. Walker*, 812 F.2d 304 (7th Cir. 1987) and *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987) (Petition at 37-39), is entirely misplaced, as those cases both were decided *prior* to this Court's decision in *Anderson*, which Petitioner maintains added a distinct "particularity" element to the *Harlow* analysis. The Ninth Circuit's decision below plainly cannot conflict with the Seventh or the First Circuit on their application of a decision not yet rendered by this Court.

Moreover, there is no conflict between the Ninth Circuit's decision below and either the Seventh or First Circuit decisions. In *Mendez-Palou* the First Circuit analyzed the immunity defense to a First Amendment claim by reference to the "particular position" of the discharged employee. 813 F.2d at 1259. Similarly here,

in analyzing Petitioner's immunity defense to Respondent's First Amendment claim the Ninth Circuit focused on Respondent's "particular position," concluding that "it was not clearly established in 1982 that *prosecutors* were protected by the First Amendment from such disciplinary action." 924 F2d at 1453; emphasis in original.

Colaizzi is fundamentally distinguishable on different grounds. Notably, the Second Circuit found that no property or liberty interests were implicated, and treated the employee's claim as a "federal tort" claim for defamation. 812 F.2d at 307. The Court then focused exclusively on its own limited precedent. *Id.* at 308-310.

Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989), *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989) and *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.) *cert. denied*, ___ U.S. ___, 110 S.Ct. 101 (1989), also cited by Petitioner, are equally unavailing. None of these decisions differs from the Ninth Circuit's approach in this case in its legal

analysis of the immunity claim before it. The *Powell* and *Price* decisions reiterate the "reasonable official" standard and cite *Anderson*. *Powell*, 865 F.2d at 1457; *Price*, 874 F.2d at 260. Moreover, in *Price* the terminated employee had been given some measure of *pre*-deprivation due process, where Respondent in this case was not. 874 F.2d at 260.

Barts is so fundamentally distinguishable on its facts -- the plaintiff had challenged her involuntary detention and transportation to the sheriff's station on Fourth Amendment grounds -- that its relevance is questionable. Moreover, the Court in *Barts* concluded that the plaintiff had failed to identify the rights allegedly infringed with sufficient particularity. Here Respondent has clearly defined and specifically articulated his employment-based property and liberty interests. Indeed, Petitioner has conceded that Respondent had a

property interest under California law. 924 F.2d at 1451, Appendix at 7a.

Nor is the Ninth's Circuit's decision in conflict with the Second Circuit's decision in *Dobosz v. Walsh*, 892 F.2d 1135 (2nd Cir. 1989), also discussed and relied upon by Petitioner. Petition at 39. In *Dobosz* the Second Circuit applied *Harlow* and *Anderson* to determine whether a police superintendent enjoyed qualified immunity in an action brought by a police officer who had been suspended for admitting, under oath, that he had violated a departmental rule. The Court announced the applicable immunity standard as follows:

> Government officials performing discretionary functions are generally protected from civil liability where the challenged conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The existence of such qualified immunity turns on the objective legal reasonableness of those actions under the

> legal rules prevailing at the time the actions were taken. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

Dobosz, 892 F.2d at 1140. Applying this objective, "reasonableness" standard, the Second Circuit then determined that the superintendent was entitled to qualified immunity on the police officer's due process claim, because the police officer had admitted, under oath, to violating a departmental rule, but that the official was not entitled to immunity on the officer's First Amendment claim. The Second Circuit thus expressly applied the same "reasonable person" standard that the Ninth Circuit applied in this case. *Compare, Dobosz*, 892 F.2d at 1140, *with Finkelstein*, 924 F.2d at 1451, Appendix at 6a.

Dobosz makes no mention of any requirement that the immunity analysis be "particularized" and does not use the term. At most the Second Circuit's decision

is simply longer, in part because of the Court's discussion of a related case involving the same parties. 892 F.2d at 1141. If anything, the Court in *Dobosz* took pains to *avoid* becoming embroiled in the specific underlying factual circumstances of the case before it:

> This is a close issue because it is anything but clear whether Dobosz's testimony was a misstatement made under pressure or, if not, exactly what he is supposed to have lied about. Nevertheless, *the objective test obliges us to put aside the circumstances suggesting Walsh's bias against Dobosz and to view the latter's naked testimony.* After doing so, we must conclude that a pre-suspension hearing was unnecessary where the offending officer admits a violation of departmental rules under oath.

Ibid.; emphasis supplied.

Thus, even if the degree of "particularity" of the immunity analysis could give rise to an inter-Circuit conflict, which Respondent denies, no such conflict exists between the Ninth Circuit's decision here and the Second Circuit's decision in *Dobosz*. Moreover, as

discussed below, the difference, if any, in the degree of "particularity" of the immunity inquiry does not present a question of federal law of sufficient importance to warrant this Court's review.

III. THE PETITION SHOULD BE DENIED BECAUSE IT PRESENTS NO IMPORTANT, RECURRING OR UNRESOLVED QUESTION OF FEDERAL LAW MERITING THIS COURT'S REVIEW

As established above, Petitioner's claim amounts to no more than a fact-bound attack on the merits of the Ninth's Circuit's determination that he is not entitled to a defense of qualified immunity on Respondent's due process property and liberty claims. At issue before the Ninth Circuit was the narrow question whether it should have been reasonably apparent to Petitioner, the county's District Attorney, in October 1982, that Respondent, a Deputy District Attorney, was entitled to notice and an opportunity to be heard before being suspended and having his suspension and the alleged but unproven

grounds for the suspension disclosed to the press. Further, the Ninth Circuit's decision arises in the particular historical and political context of the local 1982 election and campaign. The Ninth Circuit's conclusion, based on its *Harlow/Anderson* analysis, that it was clearly established in 1982 that Respondent was entitled to notice and a hearing thus does not present an important issue of federal law that is likely to recur or that otherwise merits this Court's review.

The standard for qualified immunity was set forth by this court in *Anderson v. Creighton*. The degree of "particularity" that is required of a court analyzing a public official's qualified immunity defense simply is not an unresolved important question of federal law. Because the Ninth Circuit's decision is fully consistent with *Anderson* and conflicts with no other Circuit Court's holding or analysis, there is no basis to revisit a settled legal standard.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 12, 1991

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